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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 479

DILLARD MORRISON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. _____

DILLARD MORRISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Dillard Morrison, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 26, 1965.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit has not yet been published and is appended hereto, *infra*, at page 1a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 26, 1965, page 8a, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1) and Rule 22(2) of this court.

Questions Presented

1. When the defense of entrapment is raised, is the "police conduct" rule the sole test to be applied, even though not specifically requested?

2. Is petitioner entitled to cautionary instruction on prior criminality relative to the issue of petitioner's predisposition to commit the crime charged?

3. Is there "plain error" where the trial court mentions "innocent person" in its charge without restricting its meaning as applied to the defense of entrapment?

4. If the "police conduct" rule is to be charged only in the alternative, does the failure to charge clearly and explicitly constitute "plain error" in the absence of a request to charge the "police conduct" rule?

Statutes and Rules Involved

Title 26, Section 4705(a)

United States Code

"(a) General requirement.

It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given,

on a form to be issued in blank for that purpose by the Secretary or his delegate."

Title 26, Section 7237(b)

United States Code

"(b) SALE OR OTHER TRANSFER WITHOUT WRITTEN ORDER.—Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and—

(1) the offense consistsed of the sale barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense, or

(2) the offense consisted of a conspiracy to commit an offense described in paragraph (1), the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000."

RULE 52, FEDERAL RULES OF CRIMINAL PROCEDURE

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Statement of Facts

The petitioner was convicted in the United States District Court for the Southern District of New York on two

counts of selling or giving away narcotics in violation of Title 26, Sec. 4705(a) and 7237(b), before a judge and a jury. He was sentenced to 20 years on each count to run concurrently. The jurisdiction of the District Court was invoked because the case arises under the Federal Statutes cited above.

The government's case consisted of testimony by two agents who in the main testified that shortly after midnight on January 3, 1963 in the City of New York, Howard T. Jackson and Walter Smith, Special Agents of the United States Treasury Department met with an informant, Joe Miles, relative to an under-cover investigation in the field of narcotics (R-10).* Following their discussion, the informant introduced Jackson as "the person who wanted to buy a large quantity of cocaine" to the petitioner. Before making any purchase, Jackson wanted a sample to which petitioner agreed and gave it to him free of charge (R-16).

Later on the same day, Jackson told petitioner that he was satisfied with the sample and wanted to make a purchase. Petitioner insisted on an advance payment which Jackson refused, whereupon the transaction ended (R-22).

There was no communication between Jackson and petitioner until January 12, 1963 when they resumed negotiations. On that day Jackson paid $2,000.00 for ⅛ kilogram of cocaine. Later that evening a package of cocaine was delivered. Jackson admitted on cross-examination that the informant, Joe Miles, was asked to keep a continuous check on petitioner's activities for 6 or 7 months prior to January 2, 1963.

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* Record references are to the appendix filed with the United States Court of Appeals for the Second Circuit.

Walter Smith the other government agent substantially corroborated Jackson's testimony as to the events of January 2, 3, and 12, 1963. However, on cross-examination he admitted that he had arrested the informer on April 3, 1962 for conspiracy to violate the Federal Narcotics law and from that date on the informer had cooperated with the authorities. One of the cases was in relation to the petitioner. The total number of cases which Miles, the informer, "made" was 21. Cooperation by Miles would be reported to the presiding judge at the time Miles' case was ready for trial.

The petitioner testified in his own behalf admitting that he was previously convicted for the sale of narcotics in 1950 and twice for purchases of narcotics in 1943 and 1958 (R-183, 228) and also admitted to being a user of narcotics since 1947 (R-185). Petitioner claimed that he met Miles, the informer, in 1961. This relationship continued and Miles did supply petitioner with cocaine for petitioner's personal use (R-188). Beginning in June 1962, each time Miles saw petitioner when supplying him with cocaine, Miles importuned him to find another source for cocaine because Miles' supply was proving unsatisfactory. This inducement by the informer continued for 6 months (R-188).

On January 2 and 3, 1963, Miles again solicited petitioner for the purchase of cocaine and told him if the petitioner obtained same he could take out what he needed for his personal needs (R-196). Petitioner testified that on January 3, 1963, he met Miles and Miles' requirement was $3,500.00 worth of cocaine, which petitioner could not obtain.

Between January 3, 1963 and January 12, 1963, Miles repeatedly asked petitioner to secure cocaine for him (R-208). On January 12, 1963 Miles gave petitioner $2,000.00 for the purchase of cocaine and was told "you take yours out" (R-221). On the same day petitioner delivered the cocaine to Miles and not to Jackson, after taking out ½ ounce for himself (R-243).

Joe Miles was called as a witness for the defense and admitted knowing the petitioner since 1961, having met him at a dice game. He admitted that he dealt in narcotics, that he was arrested in 1962 by the Federal agents and then became a special employee working for the Government, and that he was cooperating with the Bureau expecting to receive a two year suspended sentence (R-278). He admitted to "making" 21 cases. The reason that he was out of jail was "to speak to the guys about this jazz and to inquire as to what is going on" (R-282).

Miles started speaking to the petitioner about the transaction in question in November or December, 1962 (R-288). He asked petitioner to obtain some narcotics and said that "a friend is getting a lot of trouble trying to get good cocaine" (R-286). After his first conversation with petitioner in December, 1962 he alerted the Bureau. He was familiar "with what he had to do" (R-292). Miles admitted working as a special agent after January 12, 1963. Miles also admitted that he had been prompted by the government on the evening prior to testifying (R-290).

On the issue of prior criminality the court charged (R-346):

> "In this connection, when I say that you are entitled to consider all the evidence, I mean just that literal-

ly, ladies and gentlemen. You are not only to assay the testimony as to what transpired on the given days in question, but also any information which shows the type of man that Mr. Morrison was, the type of man that Mr. Miles was, what Morrison had done previously, what his record was; all of that might have a very crucial bearing in your deliberations on this claim of entrapment of the defendant."

The court also charged (R-345):

"On the other hand, if you find from all the circumstances here, keeping in mind what the evidence shows as to the previous character and disposition and activities of the accused, that he was no more than an innocent person who was unfairly induced or coerced by the conduct of the agents or by Miles who was really an employee of the agents, if you find that the circumstances are such to show that the agents forced him or pushed him to do something that he would not otherwise have done, then you would find a situation of entrapment and it would be your duty to acquit Dillard Morrison of the crimes charged."

Reasons for Granting Writ

I. The principle question in cases where the defense of entrapment is asserted, has traditionally been in terms of whether an accused was predisposed to commit the crime charged, whether he was "ready and willing without persuasion and was . . . awaiting any propitious opportunity to commit the offense." *U. S.* v. *Sherman*, 200 F. 2d 880, 882 (2d Cir. 1952).

On at least two occasions, however, this Court in concurring opinions has indicated its dissatisfaction with this standard. Mr. Justice Roberts, joined by Brandeis and Stone, J.J., in *Sorrels* v. *U. S.*, 287 U. S. 435 (1932), and Mr. Justice Frankfurter, joined by Harlan, Brennan, and Douglas, J.J., in *Sherman* v. *United States*, 356 U. S. 369 (1958), have urged that the defendant's predisposition to commit the crime be abandoned as a criterion for determining the validity of an entrapment claim.

Justice Frankfurter pointed out that the use of the standard of the defendant's predisposition to commit the crime necessarily involved the introduction of evidence as to his reputation and prior criminal activities. "The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged." *Sherman* v. *U. S.*, 356 U. S. 369 at 382. To continue the observance of this standard would also be to divert attention from the primary purpose that the allowance of entrapment as a defense was designed to serve—preventing governmental officers from indulging in objectionable practices.

In place of the "predisposition" rule Justice Frankfurter urged that the Federal Courts exercise their responsibilities for formulating the standards for Federal law enforcement. In this regard, "The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls be-

low standards, to which common feelings respond, for the proper use of governmental power." *Sherman* v. *U. S.*, *supra*, at 382. This, in his view, is the *only* relevant inquiry in cases where the defense of entrapment is raised.

More recently, two United States Courts of Appeals, while not going so far as wholly to exclude the "predisposition" test, did consider the "police conduct" rule to be an alternative basis for the entrapment defense. *Whiting* v. *U. S.*, 321 F. 2d 72 (1st Cir. 1963) cert. den. 375 U. S. 884 (1963); *Accardi* v. *U. S.*, 257 F. 2d 168 (5th Cir. 1958) cert. den. 358 U. S. 883 (1958). In *U. S.* v. *Pugliese*, —— F. 2d —— (2nd Cir. 1965) and in the instant case the Second Circuit has done so by implication. This Court in *Lopez* v. *U. S.*, 373 U. S. 427 at page 434 (1963) recognized that the law with regard to the criterion to be applied in establishing entrapment had by no means been finally determined and indicated the unsettled nature of the law in this area:

> "The defense of entrapment, its meaning, purpose, and application, are problems that have sharply divided this Court on past occasions. See Sorrells v. United States, 287 U. S. 435; Sherman v. United States, 356 U. S. 369; Masciale v. United States, 356 U. S. 386. Whether in the absence of a conclusive showing the defense is for the court or for the jury, and whether the controlling standard looks only to the conduct of the Government, or also takes into account the predisposition of the defendant, are among the issues that have been mooted."

Justice Frankfurter referred to a similar situation when he said that the lower courts had wrestled unsuccessfully with the problem of the basis for the entrapment defense and strongly urged that the Supreme Court clarify the issue.

He suggested that "the prevailing theory of the *Sorrells* Case ought not to be deemed the last word." and continued "It [the Court] should not forego reexamination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued." *Sherman* v. *U. S., supra,* at 379.

The dangers inherent in the application of the predisposition test, even as an alternative basis for the defense of entrapment, are well illustrated in the instant case by the difficulties concerning the court's instructions. When the predisposition test is used, evidence as to the defendant's reputation and prior criminal record is of course admissible to establish that he was indeed predisposed to commit the crime charged. This, as Justice Frankfurter recognized in *Sherman,* is a practice fraught with potentialities of prejudice to the defendant and is an exception to the normal rule that the admission of evidence as to an offense other than the one at issue is reversible error. In these circumstances, the defendant was at least entitled to such cautionary instructions as would properly delimit the scope of this evidence. *Carson* v. *U. S.,* 310 F. 2d 558 (9 Cir. 1962); *Walker* v. *U. S.* 301 F. 2d 94, 98 (5 Cir. 1962). As the court said in *Hansford* v. *U. S.,* 303 F. 2d 219 at 225, 226 (D. C. Cir. 1962):

> "It is settled that inquiry into the defendant's conduct is permissible; but reason suggests that the danger to the fairness of a trial requires that when the inquiry is into past offenses it be controlled in some reasonable manner."

In the instant case the court instructed the jury that it was to consider *all* the evidence and testimony about the

defendant's record (R-346). However, not all the testimony as to petitioner's record, even with regard to the particular area of criminal offense with which he was charged, would be relevant. In *Sherman, supra,* for example, it was established that even prior narcotics convictions might be too remote in time to raise a factual issue as to predisposition to deal in narcotics.

In addition, the trial court in its charge used the phrase "innocent person" (R-345), indicating that only if the defendant were considered "innocent" would the defense of entrapment be available to him. In the *Hansford* case, *supra,* however, which also dealt with a narcotics charge in a situation where the defendant had a record of narcotics and non-related offenses, the court spoke reprovingly of the use of the word "innocent" in the charge.

> "If the term 'innocent' is to be used at all—it is preferable to avoid its use altogether—it should be explained so that the jury will understand that a criminal record does not disqualify an accused from defending on the ground of entrapment . . . readiness or predisposition is not established by evidence that the person is not 'innocent' in that he has a criminal record'. Innocent in the context of entrapment means that the defendant would not have perpetrated the crime for which he is presently charged but for the enticement of the police official. The defendant, in such circumstances, must be considered a previously innocent person." (p. 222)

The court's reasoning in *Hansford* as to the potentiality for misleading the jury in referring to "innocent" men is clearly applicable in the instant case. The court below was

itself critical of the use of the term "innocent person" in the charge without restricting its meaning (6a).

It was our contention before the Court of Appeals, and we assert before this Court, that the failure of the trial judge to give cautionary instructions on the issue of the defendant's prior criminal record and its use of the misleading phrase "innocent person" constituted such plain error as would entitle the case to review under Rule 52(b) even though objections were not raised at trial. At the very least, these issues serve vividly to illustrate the difficulties and the potentialities for prejudice to the defendant inherent in the use of the predisposition standard.

It is true that the issue of charging the police conduct test was not specifically raised at trial. However, the rule that this court cannot therefore take cognizance of it, is excepted in situations where, as here, the fundamental fairness of a trial is at stake. See *Screws* v. *U. S.*, 325 U. S. 91 at 107.

In the instant case, it is urged that the Court's failure to charge only the police conduct rule and its introduction of a prejudicial standard for the determination of the accused's only defense was noticeable under Rule 52(b) of the Federal Rules of Criminal Procedure and was grounds for reversal.

II. The Court of Appeals for the Second Circuit indicated in *U. S.* v. *Pugliese, supra,* that the police conduct rule was an alternative basis for the entrapment defense. In this, the Court of Appeals agreed with the First and Fifth Circuit Courts in their decisions in *Whiting* v. *U. S.*, 321 F. 2d 72 (1 Cir. 1963) cert. den. 375 U. S. 884 (1963) and *Accardi* v. *U. S.*, 257 F. 2d 168 (5 Cir. 1958), cert. den. 358 U. S. 883 (1958), respectively. In the instant case, the

Court below conceded that the police conduct rule should have been charged but that although the trial court had not done so "with absolute clarity", its words so substantially carried this meaning that in the absence of an objection, the charge was sufficient (4a).

Here, the conduct of the Federal Officers was particularly reprehensible. The Narcotics Bureau unleashed the informer Miles with authority to go out and "make" cases, his incentive being the most urgent and base one of winning official favor by offering up other victims to the Bureau.

It is urged, that if the police conduct rule is to be charged as even an alternative basis of the defense of entrapment, it should at least be put before the jury in the most explicit manner. There should be no doubt that the conduct of Federal Officers in the particular circumstances is a relevant consideration and if that conduct "falls below standards, to which common feelings respond, for the proper use of governmental power", the accused is to be found not guilty.

Federal circuit courts support the contention that, particularly in cases where the defense of entrapment is asserted, the charge to the jury is to be clear and definite. In *Collier* v. *U. S.*, 301 F. 2d 786, 787 (5 Cir. 1962), the court said that the appellant was entitled to "a complete and accurate charge on the question of entrapment". Since in the present case, the judge failed to charge explicitly one of the standards recognized as basic to a determination of the defense of entrapment it could hardly be said that the instruction conformed with the "complete and accurate" requirement of the *Collier* case.

The court in *U. S.* v. *Sawyer*, 210 F. 2d 169, 171 (3 Cir. 1954), declared that ". . . the issue of entrapment should have been submitted to the jury with an appropriate explanation of the legal prerequisites of that defense." In the instant case, the judge certainly did not comply with this direction since he failed to charge explicitly that the police conduct rule was a basis for the defense of entrapment. It is asserted that the failure so explicitly to charge is grounds for reversal and should constitute the "clear error, affecting substantial rights" that is necessary under Rule 52(b) to review issues not specifically raised at trial.

Justice Frankfurter also observed that "entrapment has been the decisive issue in many prosecutions." *Sherman, supra,* at 378. A definitive statement of the standard to be applied in determining the validity of an entrapment claim is therefore important to the disposition of a numerically significant group of cases.

In addition, the attention given this prbolem in law review articles further demonstrates its importance and its controversial nature. See 73 Harvard Law Review 1333 (1960); 28 Columbia Law Review 1067; 60 Yale Law Journal 1091; 33 N. Y. U. Law Review 1033.

For these reasons, it is urged that this Court take this occasion to review and define the law relative to the standard to be used in ruling on the defense of entrapment.

With regard to the case at bar, it is urged that this Court (1) find that the police conduct rule *alone* should have been charged and that the failure to do so constituted reversible error despite the fact that the issue was not raised at trial; or (2) find that the trial court's failure to give proper instruction as to the petitioner's criminal record and its use

of the misleading phrase "innocent persons" was reversible error of sufficient dimension to entitle the issue to review under Rule 52(b); or (3) find that, if the police conduct rule is to be charged only in the alternative, it should be stated explicitly and failure to do so constituted reversible error, even in the absence of an objection below.

CONCLUSION

Wherefore, for the reasons herein above stated, it is respectfully submitted that this petition should be granted.

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APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 488—September Term, 1964.

(Argued May 18, 1965 Decided July 26, 1965.)

Docket No. 29465

UNITED STATES OF AMERICA,

Appellee,

v.

DILLARD MORRISON,

Defendant-Appellant.

Before:

WATERMAN, MARSHALL and ANDERSON,

Circuit Judges.

Appeal from judgment of conviction for violations of 26 U. S. C.§ 4705(a), United States District Court for the Southern District of New York, Tyler, J., with jury. Affirmed.

Opinion of United States Court of Appeals

ROBERT L. LATCHFORD, Asst. U. S. Atty. (Robert M. Morgenthau, U. S. Attorney; David M. Dorsen, Asst. U. S. Atty.), for Appellee.

RAYMOND A. BROWN, Jersey City, N. J., for Defendant-Appellant.

WATERMAN, Circuit Judge:

After a three-day trial in the United States District Court for the Southern District of New York, before Judge Tyler and a jury, defendant was convicted on two counts of selling or giving away narcotics without obtaining a written order on an official form. 26 U. S. C. §4705(a). We affirm the conviction.

Defendant claims that the trial judge erred in his charge to the jury on the issue of entrapment, first, by failing to instruct that unconscionable government conduct in promoting the acts for which defendant was prosecuted would nullify his guilt, and second, by failing to delimit the probative significance of defendant's prior criminal record. Because these claims were not raised at the trial, we shall notice them only if they demonstrate "plain errors or defects affecting substantial rights." Fed. R. Crim. P. 52(b).

First. Assuming that the government had initiated or set in motion the acts for which defendant is being prosecuted, the crucial issued posed by the defense of entrapment traditionally has been: "[W]as the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence." *United States* v. *Sherman*, 200 F. 2d 880, 882 (2 Cir. 1952). However, a recent reassessment of the entrapment defense has led two Courts of Appeals to inquire, alternatively, wheth-

er, in exposing the defendant's criminality, the government agents have acted in an offensive manner or lived up to reasonably decent civilized standards for the proper use of government power. *Whiting* v. *United States*, 321 F. 2d 72, 76-77 (1 Cir.), *cert. denied*, 375 U. S. 884 (1963); *Accardi* v. *United States*, 257 F. 2d 168, 172-73 (5 Cir.), *cert denied*, 358 U. S. 883 (1958).

This elaboration of the defense of entrapment is mainly derived from a viewpoint thus far adopted by only a minority of the Supreme Court. See *Sorrells* v. *United States*, 287 U. S. 435, 453-59 (1932) (separate opinion of Roberts, Brandeis, and Stone, JJ.); *Sherman* v. *United States*, 356 U. S. 369, 378-85 (1958) (concurring opinion of Frankfurter, Douglas, Harlan, and Brennan, J.J.). However, the current majority has expressly declined to disavow permanently this viewpoint which focuses on the conduct of the government. As the Supreme Court has said:

> "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible stratagems involved in the detection and prevention of crime. Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged." *Lopez* v. *United States*, 373 U. S. 427, 434-435 (1963).

And see *Sherman* v. *United States*, *supra* at 376-77. Moreover, the majority, too, has spoken of the entrapment de-

fense in terms of "integrity of administration" and "objectionable police methods." *Sorrells* v. *United States, supra* at 448-49; *Sherman* v. *United States, supra* at 372.

Accordingly, in *United States* v. *Pugliese* (2 Cir. June 8, 1965), our court recently recognized that the alleged exertion of "undue pressure" or "improper pressure" by the government was a "principal point of dispute" and a "crucial issue" in the case. We take this opportunity to restate what was implicit in our former decision: assuming that the government has initiated or set in motion the acts of the defendant, the entrapment defense probes not only the predisposition of the defendant to commit the crime with which he is charged, but alternatively the conduct of the government in promoting the commission of the crime. In the absence of briefing by the parties we shall also assume *solely for the purposes of this case* that the issue of the government's conduct is to be determined by the jury, just as is the issue of the defendant's predisposition; but see *Whiting* v. *United States, supra* at 76 n. 8.

At the same time, we stated in *United States* v. *Pugliese, supra* at ——, that when the trial judge instructs the jury that the defense of entrapment turns on a finding of "persuasion and representations" by the law enforcement officers, the jury is likely to understand him to mean the exertion of undue and improper pressure by the government. Here the trial judge went further; he spoke of defendant's allegedly having been "unfairly induced or coerced by the conduct of the agents" and of the agents having "forced him or pushed him" to commit the crime. While this charge did not state with absolute clarity that government misconduct is an alternative basis of the entrapment defense, we hold it to have been sufficient in the absence of an

objection at trial by defendant. See *United States* v. *Kahaner*, 317 F. 2d 459, 477 (2 Cir.), *cert. denied*, 375 U. S. 835, 836 (1963).

Second. After defendant himself had testified to his past criminal convictions for narcotics offenses and assault, the trial judge instructed the jury:

> "You are not only to assay the testimony as to what transpired on the given days in question, but also any information which shows the type of man that Mr. Morrison was, . . . what Morrison had done previously, what his record was; all of that might have a very crucial bearing in your deliberations on this claim of entrapment of the defendant."

The trial judge also suggested that defendant must have been an "innocent person" in order to be entitled to acquittal on the ground of entrapment.

Defendant acknowledges that his prior criminal record was relevant to the issue of whether he was predisposed to do the acts for which he was prosecuted. *United States* v. *Sherman, supra* at 882. He argues, however, citing *Sherman* v. *United States, supra* at 375-76, that the trial judge erred in failing to warn the jury to discount past criminal offenses remote in time or in kind. He also contends, citing *Hansford* v. *United States*, 303 F. 2d 219, 221-22 (D. C. Cir. 1962), that the jury might have understood the trial judge's allusion to the "innocent person" to mean that only those without prior criminal records are entitled to acquittal on the ground of entrapment.

Because defendants may be seriously prejudiced by the introduction, even though proper, of evidence bearing on

their past criminal offenses, careful instructions are appropriate to limit the degree of prejudice. The principal danger, however, is that the government will introduce the evidence and that the jury will take it as proof of guilt. See *Sherman* v. *United States, supra* at 382 (concurring opinion); *Hansford* v. *United States, supra* at 225-26. Here, the evidence was introduced by defendant himself, and the trial judge expressly warned the jury, "Mr. Morrison is not on trial for any other charges than the ones I have been discussing, and thus it is not relevant to the charges of the criminal conduct as such that any previous record be considered."

As for possible prejudice with regard to the defense of entrapment, we agree that more precise instructions might have been appropriate and that the allusion to the "innocent person" might better have been avoided. Defendant cannot demand a jury charge perfect in every significant detail, however, unless he is prepared to assist the trial judge in formulating one. In the absence of an objection at trial by defendant, we cannot say that in this case the instructions taken as a whole, were so likely to mislead the jury on the entrapment defense as to constitute blatant error requiring reversal. Compare *United States* v. *Pugliese, supra* at ——.

Defendant also claims that the evidence established entrapment as a matter of law, and therefore the trial judge should have directed his acquittal. We need not decide whether defendant's testimony, if true, warranted a directed verdict in his favor. There was conflict in the proofs on this issue, and the jury was entitled to rely on the evidence favorable to the government. See *Masciale* v. *United States*, 356 U. S. 386, 388 (1958); *United States* v. *Pugliese*,

supra at ——. The jury could rationally conclude, on the basis of this evidence, that defendant was predisposed to sell or give away narcotics. See *United States* v. *Pugliese*, *supra* at ——; *United States* v. *Orza*, 320 F. 2d 574 (2 Cir. 1963). Moreover, assuming as the defendant would have us that the issue of government misconduct was to be determined by the triers of fact, the jury also could reasonably decide that the bounds of fairness had not been exceeded in this case.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of July one thousand nine hundred and sixty-five.

Present: HON. STERRY R. WATERMAN,
HON. THURGOOD MARSHALL,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DILLARD MORRISON,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 479

DILLARD MORRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 377-382;[1] Pet. App. 1-7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1965 (R. 383; Pet. App. 8). The petition

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[1] "R." designates the blue bound volume on file with the Clerk of this Court containing petitioner's appendix in the court of appeals and the opinion and judgment of that court.

for a writ of certiorari was filed on August 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court properly presented to the jury the issue of entrapment.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts charging substantive narcotic offenses in violation of 26 U.S.C. 4705 (a) (R. 4-5, 356). He was sentenced to concurrent sentences of 20 years' imprisonment on each count (R. 365-367). The court of appeals affirmed (R. 337-382; Pet. App. 1-7).

1. The evidence adduced by the government showed that on January 3, 1963, agent Howard Jackson was introduced to petitioner by special employee Miles as someone who wanted to purchase a large quantity of cocaine. Petitioner said he would be able to take care of Jackson's needs (R. 12-13). At petitioner's direction, after he had made some telephone calls, the three went to meet a person whom petitioner referred to as the "coke man". During the trip, petitioner said the cocaine "had been the best that he had seen in several years." Jackson insisted on a sample (R. 15). After meeting a man and receiving a package from him, petitioner handed Jackson the package and said "[H]ere's the coke, and the man claims it [is] dynamite." (Count one; R. 14-17, 123-125).

Jackson subsequently expressed satisfaction with the sample and wanted to buy an eighth of a kilo. Petitioner said "his connection" might not want to sell "that small a quantity" (R. 20-21). When petitioner requested payment in advance, Jackson said that he had been "beaten out of his money" on prior occasions and did not want to be "put in that position again" (R. 20-22). At this point petitioner and Jackson agreed to "forget the whole deal" until they could come to some agreement as to how they could do business (R. 22-23, 126).

Petitioner subsequently had Miles arrange a meeting with Jackson on January 12. At this meeting he told Jackson that he was "prepared to take care of the business in a better manner" (R. 27, 129). Petitioner, Jackson, Miles and a woman by the name of Lee Simone then drove off in petitioner's automobile (R. 28-29) to West 48th Street "where the coke man lived" (R. 29-30, 129-131). Jackson gave petitioner $2,000 in official government advance funds. As he left the automobile, petitioner told the agent not to worry about his "two grand", since he was leaving him "a $5,000 car as security" (R. 33). Immediately after petitioner and Miss Simone entered the premises, another automobile drove up and one Julio Hernandez (who was known to the agents) entered the premises and had a brief conversation with petitioner (R. 35, 131-132). Petitioner and Miss Simone then returned to the Cadillac and informed Jackson that the delivery would take about an hour (R. 34).

About 6:30 p.m., petitioner and Miss Simone again entered the premises. Some three hours later, Julio

Hernandez was seen to get out of a taxicab, take a "small white package" from another occupant of the taxi, and then enter the building (R. 36-37, 132-133). Shortly thereafter, Simone and petitioner returned to the automobile and Simone handed petitioner a "white package", which he in turn handed to Jackson saying "[h]ere is the coke" (R. 37, 133). On taking the package Jackson said it felt a "little light in weight to be an eighth of a kilo." Petitioner responded that if Jackson "had any complaints," to bring it back and he "would certainly make it good" (Count 2; R. 38).

The packages of white powder delivered by petitioner to agent Jackson on January 3 and 12, 1963, were not turned over pursuant to a written order form and were found to contain cocaine (R. 23-26, 39-42, 127-128, 135-137, 176-178).

2. Petitioner's sole defense at trial was that he was entrapped into committing the narcotics offenses by the actions of special employee Miles. He said that in 1962 he won money from Miles at a "crap game" and that Miles made payments in cocaine (R. 186, 232-233). From that time until late in January 1963, petitioner, who was an addict, received cocaine from Miles about "three time a week or more", free of charge (R. 237, see also R. 186, 189, 208-209, 232-233, 236-237). During this period Miles repeatedly asked petitioner to get him cocaine because the cocaine Miles was getting "wasn't good" (R. 235-237, 187, 189, 190). Petitioner said he finally agreed to the January transactions because Miles threatened to cut off his free supply and promised that he could

take for his own use some of the cocaine delivered (R. 190-197, 221, 233-234, 240-243). Petitioner further stated that on January 12, after he had obtained the cocaine from his source in exchange for the $2,000 he had received from Miles (to whom he said the narcotics were sold), he removed "a little over a half ounce, maybe about three-quarters of an ounce" and gave the remainder to Miles (R. 220-223, 242-243). Petitioner testified on direct examination that he had previously been convicted on an assault charge and had three prior narcotics convictions—in 1943 or 1944, 1950 and 1958 (R. 183, 227-228).[2]

He testified on cross-examination that Miles had for approximately six months given him some $2500 worth of cocaine free of charge (R. 243-245); that no one else had ever done that for him (R. 246); and that at the time of the transaction he could not afford to buy cocaine. He admitted, however, that he had been purchasing cocaine for a number of years from someone he identified only as "Jim" and had another source, one "Pinton", from whom he obtained the January 12 narcotics (R. 250-256).

Joe Miles, called as a defense witness, testified that he never sold or gave petitioner any cocaine (R. 294-295). He said that he first spoke to petitioner about narcotics about "a week or maybe ten days" before petitioner gave agent Jackson the sample (R. 283, 287, 316-317); that, in response to his inquiries, peti-

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[2] He again admitted commission of these offenses on cross-examination (R. 247-248). In addition, he admitted on cross-examination to various convictions of assault in the 1940's through the 1960's (R. 267-270).

tioner stated that "there wasn't too much happening as far as heroin goes but cocaine, yes" (R. 286); that he thereafter arranged petitioner's meetings with agent Jackson; and that the two January transactions which followed were between Jackson and petitioner (R. 293-294, 296-297). Miles never told petitioner to take any of the narcotics for himself (R. 297, 299, 311).

Miles further testified (as had agents Jackson and Smith (R. 45, 47, 154-155)), that he never received money or narcotics from the Bureau of Narcotics for his work as an informant (R. 315) and he denied being told that unless he cooperated he would go to jail (R. 315). He stated that from what they had told him, he expected the agents to bring his cooperation to the attention of the court and that he was expecting to receive a suspended sentence on a 1963 narcotics charge for which he had been arrested prior to becoming a special employee (R. 275-282).[3]

3. The trial court, *inter alia*, instructed the jury that one of the defense claims was that the transactions of January 3 and 12, 1963, were "between [petitioner] and the special employee or informer" (R. 343) and that, in order to convict the petitioner on either or both of these counts, the jury had to find

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[3] Agent Smith testified in this connection that in April 1962 he had arrested Miles on a narcotics charge and, as far as he knew, the case had not yet been disposed of (R. 150-181). He further stated that Miles had been advised that "any cooperation that he extended to the Bureau of Narcotics would be made known to the presiding judge at the time that his own instant case was reported to trial." (R. 155-156).

"that the narcotic drug or drugs were either sold or bartered or exchanged or given away to Howard Jackson, nobody else but Howard Jackson; * * *" (R. 338).

The trial judge also instructed that in weighing the testimony of Miles the jury should keep "carefully" in mind that he "lives in hope" that he will get leniency when his case comes up for disposition; that this hope does not mean he "necessarily is a liar", but that it required the jury to "scrutinize his testimony with particular care" (R. 349-350).

The judge charged additionally in pertinent part (R. 344-346, 350):

> * * * The fact that government agents merely afford an opportunity or opportunities for the commission of an offense does not constitute entrapment. Entrapment appears only when the criminal conduct was the creative activity of the law enforcement agents themselves * * *.
>
> * * * If the government can satisfy you that the accused, Mr. Morrison, was ready and willing to commit the offense or offenses charged whenever the opportunity offered itself, then there would not be any entrapment. * * *
>
> * * * Now, you are entitled to consider the evidence and decide. Was Mr. Morrison a man who by predisposition was ready, willing and able to give away narcotics or sell narcotics in the days in question and was only offered an opportunity which he was only too eager to take? If that is all that you find from the evidence, then there was no entrapment and there would be no legal defense to the crimes charged.

On the other hand, if you find from all the circumstances here, keeping in mind what the evidence shows as to the previous character and disposition and activities of the accused, that he was no more than an innocent person who was unfairly induced or coerced by the conduct of the agents or by Miles who was really an employee of the agents, if you find that the circumstances are such to show that the agents forced him or pushed him to do something that he would not otherwise have done, then you would find a situation of entrapment and it would be your duty to acquit Dillard Morrison of the crimes charged.

In this connection, when I say you are entitled to consider all the evidence, I mean just that literally, ladies and gentlemen. You are not only to assay the testimony as to what transpired on the given days in question, but also any information which shows the type of man that Mr. Morrison was, the type of man that Mr. Miles was, what Morrison had done previously, what his record was; all of that might have a very crucial bearing on your deliberations on this claim of entrapment of the defendant.

* * * *

Well, obviously, Mr. Morrison is not on trial for any other charges than the ones I have been discussing, and thus it is not relevant to the charges of the criminal conduct as such that any previous record be considered. However, you would be entitled to consider such evidence as you recall of a previous criminal record on the part of the defendant in assaying his credibility, just as in the case, in other words, of Mr. Miles.

There was no exception to the charge on the entrapment issue.

ARGUMENT

As this Court stated in *Lopez* v. *United States*, 373 U.S. 427, 434, the "conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents" (emphasis in original). See also *Sherman* v. *United States*, 356 U.S. 369, 372-373; *Sorrells* v. *United States*, 287 U.S. 435, 441, 451. The ultimate issue is, as the trial judge charged, whether the criminal conduct was the product of the creative activity of law-enforcement officers. That ultimate issue necessarily involves two factors—the conduct of the officers and the character of the accused. This Court said in *Sherman* v. *United States*, *supra*, 356 U.S. at 373:

> On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence.

The trial judge's charge, to which petitioner took no exception, properly put this ultimate issue, and the factors which enter into it, to the jury in terms which closely follow this Court's *Sherman* decision. (See pp. 7-8, *supra*).

Much of petitioner's argument stems from the fact that the opinion of the court of appeals, looking toward future cases, has endeavored to refine the factors which go into the ultimate issue as two alterna-

tive bases for finding entrapment, ruling that government misconduct may constitute a basis for the defense of entrapment regardless of the predisposition of the defendant. Whatever the merits of this analysis it does not bear upon this case, where there was no showing of police initiative beyond the use of an informer to make an introduction.

As to the element of predisposition, this Court has said that, "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." *Sorrells* v. *United States*, 287 U.S. 435, 451-452; *Sherman* v. *United States*, 356 U.S. 369, 373. Petitioner argues (Pet. 12) that the trial judge should have admonished the jury to disregard those of petitioners's prior convictions remote in time and different in kind from the present charge. But it was defense counsel who initially introduced into evidence the major portion of petitioner's criminal record. Moreover, the trial court specifically admonished the jury that petitioner was "not on trial for any other charges" and that it was "not relevant to the charges of the criminal conduct as such that any previous record be considered" (R. 350). In any event, inasmuch as petitioner took the stand in his own defense, these convictions could, as the trial judge further charged, be considered by the jury in "assaying his credibility" (R. 350).

When read in context, the court's use of the term "innocent person" in the instructions, while perhaps

inapt, did not confuse the jury as petitioner contends. The instruction as a whole made it clear that if petitioner had been pushed by government agents into committing the acts, he could not be convicted. Moreover, petitioner is foreclosed from relying upon this phrase as grounds for reversal in view of his failure to object at the trial. Rule 30, F.R.Crim.P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
*Acting Solicitor General.**

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

OCTOBER 1965

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* In lieu of the Solicitor General, who has disqualified himself.

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